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DEC 1 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM—1958

No. 511

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the S/T "RINCON HILLS", and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Petitioners,

against

The steamtug "LONG BRANCH", the RAILWAY CARFLOATS Nos. 61 and 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the steamtugs "AJAX" and "BJAX", the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents,

(and three related causes).

OBJECTION OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY TO MOTION OF CANADIAN SHIPOWNERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

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BOWNE & CO., INC., 345 FRONT STREET, NEW YORK 5

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Canadian Shipowners Association have petitioned for leave, in accordance with Rule 42 of the rules of this court, to file a brief as amicus curiae in connection with

the petition for certiorari of Deep Sea Tankers, Limited and Shell Oil Company, Incorporated.

Neither respondent has consented to the filing of such a brief.

Accordingly, Rule 42 (2) is not available to movant in support of its application. Movant's application, therefore, is pursuant to the provisions of Rule 42 (3).

The motion on behalf of Canadian Shipowners Association attempts to comply with the provisions of subdivision 3, of the above rule, by alleging two grounds of interest of the Canadian Shipowners Association in a determination of this petition. Although alleged as two separate grounds, the interests of the movant definitely are limited to a desire to achieve uniformity between the admiralty courts of Great Britain and Canada on the one hand and the admiralty courts of the United States on the other hand, with respect to the question of the determination of the limitation fund, in circumstances where an offending tugboat had in tow two steel car floats, owned by the tugboat owner at the time of the alleged offense Both carfloats have been held free from any fault.

In an effort to overcome the express position contained in Rule 42 (1), that motions of this type "are not favored", movant urges the following ground:

> "Petitioners being only a single shipowner and a single charterer respectively, may not be in a position to present adequately to this court the importance of these questions (desirability of uniformity) to the entire shipping industry and to the members of this Association."

Respondent has not available any figures on the relative chartered tonnage employed by the petitioner, Shell Oil Company, Incorporated or on the chartered tonnage employed by the movant, Canadian Shipowners Association. However, it may be said that Shell Oil Company is one of the world's largest oil companies; also, Shell Oil Com-

pany's business is very extensive and world-wide. Any implication in movant's ground that the petitioners are not in a satisfactory position to adequately treat and to thoroughly develop any or all issues germane to the determination of the petition, manifestly is patently contra to the actual conditions.

It is the burden of the movant to establish far more than a mere idle assertion that petitioners "*may not** be in a position to present adequately to this court the importance of these questions * * *".

There is no attempt of any showing that the present petitioners have failed to treat of the ground urged by movant. There is no attempt at any showing that the petitioners will fail to treat of such questions in argument before this court. The requirement of Rule 42 (3), that the movant shall "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, * * *", it is submitted, cannot be satisfied by a superficial assertion that petitioners "*may not** be in a position" to present such questions. Such unwarranted speculation is not sufficient compliance with sub-division 3 as to overcome the lack of favor contained in sub-division 1 with reference to acceptance of briefs amicus curiae.

An examination of petitioner's brief rebuts movant's assertion that this question will not be adequately treated since movant's brief contains no citation which is not set forth in petitioner's brief.

A glance at the interest of movant, as set forth in its brief, reveals a lack of merit in the motion. That brief asserts that the law of Great Britain and Canada differs from the conclusions reached by the United States Court of Appeals for the Second Circuit, alleging that

> "if the case had been litigated in Canada, the tugs and their tows would have been considered as single

* Emphasis supplied.

units and the limitation of liability calculated of the the tonnage of the mass or flotilla."

In this case involving as it does no contractual obligation, no actual contact or collision, but only a claim of tort based solely upon a crowding situation (in which the Second Circuit expressly found the carfloats free from fault) respondent The Central Railroad Company of New Jersey does not concede that either an English or Canadian court would require the surrender of these innocent carfloats.

However, *assuming arguendo* that movant has correctly stated English and Canadian law, it is submitted that such argument is not germane to the issues at bar.

Traditionally, the manner by which the size of a limitation fund is determined involves a question of procedural, and not substantive, law. In the *Scotland*, 105 U. S. 24, this court had occasion to pass upon a situation involving collision, on the high seas, between the British vessel *Scotland* and the American vessel *Cape Dyer*. The American rule then was, and it still is, that the limitation fund must be determined by the value, immediately *after* the accident, of the vessel seeking limitation.

Under English law, the court noted that the size of a limitation fund was to be determined by the value of the vessel immediately *before* the accident.

It there was urged that the English law of limitation of liability should be applicable to the English vessel, the *Scotland*. That contention was rejected by the court, which held that, whatever law might be applicable to the substantive rights between the vessels, limitation of liability was essentially procedural and must be governed by the law of the forum.

That basic principle also was involved in the sinking of the liner *Titanic* (*Oceanic Steam Navigation Co.* v. *Mellor*, 233 U. S. 718, 34 S. Ct. 754). Mr. Justice HOLMES there dealt with a situation which fell under the heading of "forum shopping". Only one vessel was involved. It was of English

registry. It there was urged to the Court that the English law of limitation would be less favorable to the owners of the *Titanic* than the American law would be. The amount to which an owner might limit its liability, it there was asserted, was essentially a substantive question, and, accordingly, should be governed by the *lex loci delicti*. Such contention, Mr Justice HOLMES rejected in a cogent analysis of limitation of liability. His opinion again reaffirmed the principle that the size of the limitation fund was a matter of procedural law solely and was not to be subject to any attack upon the grounds of "forum shopping".

One of the questions presented in the petition for certiorari is:

> "3. When a tow and its tug belong to the same owner and are being operated as a flotilla in a common venture, and the tow obstructs and interferes with the navigation of another vessel causing damage thereto, is the owner of the flotilla required under the Limitation of Liability Act to include in his limitation fund the amount or value of his interest in the tow as well as in the tug?"

That question (although it patently begs the question) is to be resolved by this Court on the basis of applicable American Law. Should this Court apply uniformity in interpreting American law, the obvious question then would arise, with what nations is uniformity desired? Shall we be uniform with England and Canada, in this regard, but not with nations which adhere to the contrary view? Obvious pitfalls are inherent in such a criterion. This Court consistently has refused to usurp the treaty making powers of the executive or the law making powers of the legislature.

There is no good cause shown for the right to submit and file a brief as amicus curiae in this appeal.

A determination of the third question certified in the petition for certiorari on a basis of international political

expediency would represent just the type of encroachment upon the functions of the executive and legislative branches which this Court has so far declined.

WHEREFORE, it is respectfully submitted that the motion on behalf of Canadian Shipowners Association for leave to file a brief as amicus curiae be in all respects denied.

Dated: New York, N. Y., December 1, 1958.

Respectfully submitted,

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